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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

TETYANA NAZARUK,, Plaintiff, v. eBAY, INC.; ACE COINS, Defendants.	**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR IMPROPER VENUE OR, IN THE ALTERNATIVE, FOR FAILURE TO STATE A CLAIM** Case No. 2:06CV00242 The Honorable Dale A. Kimball

Defendant eBay Inc. ("eBay") submits this memorandum of points and authorities in support of its Motion to Dismiss for Improper Venue or, in the Alternative, for Failure to State a Claim ("Motion").

INTRODUCTION

The plaintiff, Tetyana Nazaruk (the "plaintiff"), is a member of eBay, who by necessity explicitly agreed to the terms of eBay's User Agreement ("User Agreement"), which requires that disputes between a user and eBay be resolved through litigation in Santa Clara County, California. Since the forum selection clause contained in the User Agreement is: (1) part of the

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agreement between the parties; (2) enforceable; and (3) mandatory, the pending action in this Court is improper and should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(3) ("Rule 12(b)(3)").

Additionally, the plaintiff in this case is an eBay user who is dissatisfied with statements posted about them by a third party (acecoins) on eBay's website. While the plaintiff seeks to hold eBay secondarily liable for these statements made by a third party, Section 230 of the Telecommunications Act of 1996 (47 U.S.C. § 230)[1] provides a complete bar to the maintenance of this case. *See e.g. Ben Ezra, Weinstein, and Co. v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000) (finding AOL was immune from suit under Section 230 for providing access to allegedly inaccurate information). As numerous courts across the country have held, Section 230 preempts any attempt to impose liability on interactive Internet services such as eBay for claims that arise from information, statements, communications, or actions taken by third parties. At least one court has found that eBay is protected by Section 230. *See Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 828-31 (2002). Accordingly, eBay also moves, in the alternative, to dismiss plaintiff's complaint (the "Complaint") as to eBay without leave to amend pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)").

Finally, the Complaint fails to state a civil rights claim under 42 U.S.C. § 1983 or § 1985.[2] The plaintiff's Section 1983 claim fails because eBay is not a state actor, nor do any of the actions detailed in the Complaint demonstrate that eBay acted under the color of state law. The plaintiff's Section 1985 claim also fails because the Complaint lacks any allegation that eBay was motivated by racial animus, nor does the plaintiff allege a violation of their right to be free from involuntary servitude and their right to interstate travel, which are the only two rights protected from private encroachment under Section 1985. *See Tilton v. Richardson*, 6 F.3d 683, 686 (10th Cir. 1993). Here, the Complaint simply alleges that a third party posted allegedly discriminatory statements about the plaintiff on eBay's Feedback Forum. This is not a civil rights case, and the Complaint is incurable by amendment.[3]

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[1] For brevity, this statute is referred to hereinafter as "Section 230."

[2] For brevity, these statutes are referred to herein as "Section 1983" and "Section 1985."

FACTUAL SUMMARY

eBay operates an online marketplace on which "users" (*i.e.*, individuals who register to use eBay's services) may list items they wish to sell and through which potential buyers may purchase items from third parties. Declaration of Allyson Willoughby ("Willoughby Decl."), ¶ 2.

A. To Participate on eBay, All Users, Including the Plaintiff, Must Agree to eBay's User Agreement.

In order to buy or sell on eBay, individuals must first register with eBay. *Id.*, ¶ 3. As part of the registration process, a potential user must complete a registration form and electronically submit the form to eBay. In order to activate the registration process, the potential user must read and agree to eBay's User Agreement, which contains the terms and conditions that govern the relationship between eBay and its users. *Id.*, ¶ 3, Exhibit ("Ex.") A. The potential user must accept the User Agreement by affirmatively clicking on a button that states "I Accept." *Id*. Users who do not click the "I Accept" button are not permitted to complete the registration process. *Id*.

The plaintiff has attached to their Complaint documents showing that they are a member of eBay and that they regularly participated on eBay. *See* Attachments to Complaint

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[3] This Motion is only submitted on behalf of eBay. This Motion is not submitted or intended to affect the allegations in the Complaint directed towards any other defendant in this action.

("Attachments"), attached hereto as Exhibit 1. As such, the plaintiff was required to expressly agree to the terms of the eBay's User Agreement when they established their account. eBay's User Agreement contains a dispute resolution provision requiring suits arising out of the User Agreement be filed in an appropriate court in Santa Clara County, California. Willoughby Decl., ¶ 4, Ex. A.

B. The Plaintiff's Civil Rights Claims Arise Out of Feedback Posted About the Plaintiff on eBay's Feedback Forum By a Third Party.

One of the services offered by eBay on its website is the "Feedback Forum." *Id*., ¶ 5. This section of the website allows users to post comments about other users with whom they have conducted transactions. *Id*. The plaintiff alleges that their constitutional rights have been violated because "EBay [sic] inc. allows to put national discrimination on web site," *see* Complaint, Section C, attached hereto as Exhibit 2, and "[o]n ebay acecoins put feedback with abusive words, which are connected with my national background." Attachments at 1. Thus, the plaintiff alleges that a third party (acecoins) posted statements about them on the plaintiff's eBay feedback page. *See* Attachments at 1. There is no allegation that eBay itself created the offending statements, and the Complaint clearly precludes such an argument. *See* Complaint; Attachments at 1-2. Plaintiff claims that eBay, as the secondary publisher of allegedly discriminatory statements made by a third party through eBay's Feedback Forum, violated the plaintiff's civil rights under 42 U.S.C. § 1983 and § 1985.

ARGUMENT

A. The Complaint Should Be Dismissed Under Rule 12(b)(3) Because eBay's User Agreement Contains a Forum Selection Clause Requiring the Plaintiff to Pursue Their Claim Against eBay in Santa Clara County, California.

1. Standard for Rule 12(b)(3) motions based on enforcement of a forum selection clause.

A motion to enforce a forum selection clause is properly brought under a Rule 12(b)(3) motion to dismiss for improper venue. *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 956 (10th Cir. 1992). Forum selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances." *Milk 'N' More, Inc. v. Beavert*, 963 F.2d 1342, 1346 (10th Cir. 1992) (enforcing a forum selection clause stating that "venue shall be proper under this agreement in Johnson County, Kansas") (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 15 (1972)); *see also Hugger-Mugger, L.L.C. v. Netsuite, Inc.*, 2005 WL 2206128, at *7 (D.Utah Sept. 12, 2005) (enforcing a forum selection clause contained in a clickwrap agreement mandating that any dispute between the parties be adjudicated in Santa Clara County, California, and dismissing action). "The burden lies with . . . the party challenging the enforceability of a forum selection clause." *Id.* at *3. To enforce a forum selection clause, a court must only find that the forum selection clause: (1) was part of the agreement between the parties; and (2) is enforceable. *Id.* at *4. Both prongs are satisfied here.

a. The Plaintiff agreed to and accepted the User Agreement containing the forum selection clause.

The forum selection clause at issue here is part of eBay's User Agreement, which the plaintiff agreed to when they signed up for eBay. Here, the plaintiff has attached to their Complaint documents showing that they are a member of eBay and regularly participated on eBay. *See* Attachments. In order to do so, the plaintiff was required to expressly agree to the terms of the eBay's User Agreement when they established their account. Willoughby Decl., ¶¶ 3-4. Thus, the forum selection clause was part of the agreement between the parties.[4]

b. The forum selection clause is enforceable.

The plaintiff cannot meet the "heavy burden" necessary to show that enforcement of the forum selection clause would be unreasonable or unjust. *Riley,* 969 F.2d at 957. As the Tenth Circuit has noted, only a showing of inconvenience "so serious as to foreclose a remedy, perhaps coupled with a showing of bad faith, overreaching or lack of notice would be sufficient to defeat a contractual forum selection clause." *Id*. This court has previously found that unsupported assertions by a party that it would be more expensive to litigate in another forum do not support a finding of inconvenience. *See Daley v. Gulf Stream Coach, Inc.*, 2000 WL 33710836 (D.Utah March 3, 2000) (rejecting a party's argument that it could not afford to litigate in the specified forum, even where the party submitted affidavits detailing their dire financial situation, finding that their "conclusory statements [we]re insufficient"); *see also Zions First Nat'l Bank v. Allen,* 688 F. Supp. 1495, 1499 (D.Utah 1988) (rejecting argument that trying this case in the specified forum would be difficult where the parties agreed to the forum selection clause).

Similarly, here, this Court should reject any "conclusory statements" by the plaintiff that litigating in Santa Clara, California would be inconvenient. Nor can the plaintiff claim any bad faith, overreaching, or lack of notice here, where the plaintiff affirmatively agreed to the User Agreement containing the forum selection clause. Willoughby Decl., ¶¶ 3-4. In fact, numerous

[4] "Click through" agreements like eBay's User Agreement are legally binding, enforceable contracts. *See Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 401-403 (2d Cir. 2004); *DeJohn v. The .TV Corp. Int'l*, 245 F. Supp. 2d 913, 918-919 (C.D. Ill. 2003); *i.LAN Systems, Inc. v. Netscout Service Level Corp.*, 183 F. Supp. 2d 328, 335-336 (D. Mass. 2002); *Hotmail Corp. v. Van$ Money Pie Inc.*, No. 98-20064, 1998 WL 388389, at *6 (N.D. Cal. Apr. 16, 1998); *Forrest v. Verizon Comm'n, Inc.*, 805 A.2d 1007, 1010-1011 (D.C. 2002).

courts around the country have enforced eBay's forum selection clause.[5] Accordingly, the forum selection clause requiring the plaintiff to bring this action in Santa Clara, California is enforceable.

c. The forum selection clause contained in the User Agreement is mandatory and should be enforced.

"Only a mandatory forum selection clause supersedes the presumption in favor of the plaintiff's choice of forum." *Hugger-Mugger*, 2005 WL 2206128 at *7. "Mandatory forum selection clauses contain clear language showing that jurisdiction is appropriate only in the designated forum." *Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318, 321 (10th Cir. 1997) (quotations omitted). In the Tenth Circuit, a forum selection clause mandating that venue "shall be proper" in a particular location is mandatory, because the "use of the word 'shall' generally indicates a mandatory intent unless a convincing argument to the contrary is made." *Milk 'N' More*, 963 F.2d at 1346 (enforcing forum selection clause stating that "venue shall be proper under this agreement in Johnson County, Kansas" because such language was mandatory).

Here, the forum selection clause contained in the User Agreement contains clear language mandating that jurisdiction is appropriate only in Santa Clara County, California: "You agree that any claim or dispute you may have against eBay *must* be resolved by a court located in Santa Clara County, California, except as otherwise agreed by the parties or as described in the

[5] *See Huang v. eBay Inc.*, No. SBA 02S00279, slip op. (Cal. Super. Ct. May 8, 2002) (dismissing case due to arbitration clause in the eBay User Agreement); *Kurzius v. eBay Inc.*, No. 99T02374, slip op. (Los Angeles Jud. Dist. Mun. Ct. Jan. 12, 2000) (holding that "[d]espite the fact that Kurzius does not raise a breach of contract claim, the terms of the User Agreement apply to any claims arising from the use of the [eBay] website and therefore its terms of requiring arbitration are applicable."); *Gafri v. eBay Inc.*, No. 2004SC001306, slip op. at 2 (Fla. Palm Beach County Ct. Mar. 12, 2004) (dismissing the action because Section 17 of eBay's User Agreement is not unconscionable and is binding and enforceable); *Wu v. eBay Inc.*, No. GN 200046, slip op. (Tex. 98th Jud. Dist. May 13, 2002) (dismissing the case and ordering arbitration to take place pursuant to the User Agreement); *Keck v. eBay Inc.*, No. CV00-6238, slip op. (Ariz. E. Phoenix #2 J. Ct. Dec. 6, 2000).

Arbitration Option paragraph below." Willoughby Decl., Ex. A (emphasis added). Use of the word "must" connotes more of a "mandatory" nature then the word "shall," which the Tenth Circuit has already found "generally indicates mandatory intent." *Milk 'N' More*, 963 F.2d at 1346.[6] If the plaintiff desires to bring suit against eBay, they "must" do so in Santa Clara County, California.

Accordingly, eBay respectfully requests that this Court enforce the forum selection clause contained in the User Agreement, and dismiss this action pursuant to Rule 12(b)(3).

B. The Complaint Should Be Dismissed as to eBay Under Rule 12(b)(6) Because eBay is Immune From Liability for the Communications of Third Parties Over its Website Under Section 230.

1. Legal standard for a Rule 12(b)(6) motion to dismiss.

The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief, or when an issue of law is dispositive. *Maher v. Durango Metals, Inc.,* 144 F.3d 1302, 1304 (10th Cir. 1998). These deferential rules, however, do not allow the court to assume that a plaintiff "can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." *Assoc. Gen. Contractors v. Cal. State Council of Carpenters,* 459 U.S. 519, 526 (1983) (footnote omitted).

2. **eBay is immune from liability for the communications of third parties over its website under Section 230.**

a. Immunity under Section 230.

As part of the landmark federal Communications Decency Act (and the

[6] *See also Excell*, 106 F.3d at 321 (enforcing forum selection clause stating that "venue shall lie in the County of El Paso, Colorado" because such language was mandatory).

Telecommunications Act) of 1996, Congress created an omnibus safe harbor provision for interactive Internet companies such as eBay, immunizing them against liability arising from the third-party information that courses through their websites. "Congress enacted § 230 to promote freedom of speech in the 'new and burgeoning Internet medium' by eliminating the 'threat [of] tort-based lawsuits' against interactive services for injury caused by 'the communications of others.'" *Ben Ezra*, 206 F.3d at 985 n.3 (citing *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

Section 230 states: "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). "By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third party. . . ." *Ben Ezra*, 206 F.3d at 986 (quoting *Zeran*, 129 F.3d at 330); *see also Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003) ("Through this provision, Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party.").

b. eBay is a provider of an interactive computer service.

As established in *Gentry*, eBay is a provider of an "interactive computer service"[7] and thus entitled to Section 230 protection. *Gentry*, 99 Cal.App.4th at 831, n. 7. The court in *Gentry* specifically found that eBay's Feedback Forum, the very same forum at issue in this action, was an interactive computer service because eBay's website enables users to "conduct sales transactions, as well as provide information (feedback) about other users of the service. In this

[7] Section 230 states that an "interactive computer service" is "[a]ny information service, system, or access software provider that provides or enables computer access by multiple users to a computer server. . . ." 47 U.S.C. § 230(f)(2).

way, eBay provides an information service that enables access by multiple users to a computer server and brings it within the broad definition of an interactive computer service provider."[8] *Gentry*, 99 Cal.App.4th at 831, n.7.

Accordingly, eBay qualifies as an interactive computer service because it enables access by multiple users to a computer server. *Id.*; *see also Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 40 n.13 (Wash. App. 2001) (finding that Amazon.com's website was an interactive computer service provider because it allowed visitors to post comments about authors and their work and thus provided an information service that enabled access by multiple users to a server).[9] Thus, eBay is an "interactive computer service," and is protected by Section 230.

c. Section 230 immunizes eBay from liability for libelous statements made by a third party.

The plaintiff's civil rights claims are squarely barred by Section 230, which protects eBay, as an interactive computer service, from being "treated as the publisher or speaker of any information provided by" a third party (47 U.S.C. § 230(c)(1)). The plaintiff admits that "[o]n ebay *acecoins* put feedback with abusive words, which are connected with my national background. He did it twice, according to copy of internet page (attachment #1)." Attachments at 1 (emphasis added). Thus, the plaintiff does not dispute that eBay is an interactive service provider nor do they dispute that the statements were posted by someone other than eBay. The plaintiff has not plead any specific facts that would avoid affording eBay with immunity under Section 230. Thus, the plaintiff cannot escape the clear Congressional intent to immunize interactive service providers such as eBay from liability for claims such as those pled by the plaintiff here.[10]

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[8] Similarly, the plaintiff in this action alleges that a third party (acecoins) left "discriminatory" feedback about them on eBay's Feedback Forum. (*See* Exhibit C: "On ebay acecoins put feedback with abusive words, which are connected with my national background."). Thus, the plaintiff's allegations involve the same service that the *Gentry* court found to be an interactive computer service under Section 230.

[9] Indeed, the definition of "interactive computer service" is to be construed broadly. *See Batzel*, 333 F. 3d at 1030 n.15 (holding that "the definition includes a wide range of cyberspace services, not only internet service providers"); *see also Carafano*, 339 F.3d at 1123 (noting that "reviewing courts have treated § 230(c) immunity as quite robust, adopting a relatively expansive definition of 'interactive computer service'"); *see also Optinrealbig.com, LLC v. Ironport Systems, Inc.*, 323 F. Supp. 2d 1037, 1044 (N.D. Cal. 2004) (referring to the term "interactive computer service" as "broadly defined" and noting that courts construing the definition "have recognized that the definition includes a wide range of cyberspace services, not only internet service providers.").

Accordingly, because eBay is a provider of an "interactive computer service" (which *Gentry* expressly found it to be), it is protected by Section 230 from liability for the statements posted by third parties, and eBay's motion to dismiss should be granted without leave to amend.

C. The Plaintiff's 42 U.S.C. § 1983 Claim Should Be Dismissed as to eBay Under Rule 12(b)(6) Because eBay is Not a State Actor, Nor Did it Act Under the Color of State Law.

Section 1983 of Title 42 of the United States Code provides individuals with redress for violations of rights "secured by the Constitution and laws of the United States" where the violations are committed under color of state law. *Yanaki v. Iomed, Inc.*, 415 F.3d 1204, 1207 (10th Cir. 2005) (quotation omitted). A Section 1983 claim must embody at least two elements:

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[10] Courts around the country, both federal and state, have been virtually unanimous in finding that Section 230 has, "by its 'plain language,' created a federal immunity to ***any*** cause of action that would make interactive service providers liable for information originating with a third-party user of the service." *Gentry*, 99 Cal.App.4th at 828 (emphasis added), *citing Zeran*, 129 F.3d at 330 (finding Section 230 immunized AOL from liability for failing to remove or screen allegedly defamatory messages posted on Internet message board); *see also Green v. America Online,* 318 F.3d 465, 470-71 (3rd Cir. 2003) (finding AOL not liable under Section 230 for allegedly defamatory messages posted to Web site by "hacker" about plaintiff); *Ben Ezra, Weinstein, and Co.*, 206 F.3d at 986 (finding AOL was immune from suit under Section 230 for providing access to allegedly inaccurate information); *Novak v. Overture Services, Inc.*, 309 F. Supp. 2d 446, 449 & 452-53 (E.D.N.Y. 2004) (finding Section 230 immunized Google from liability for not removing material on its Web site that the plaintiff deemed objectionable); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004) (finding Section 230 immunized Amazon.com from state law claims where Amazon published but did not create or develop the content); *Kathleen R. v. City of Livermore,* 87 Cal.App.4th 684, 692 (2001) (finding Section 230 immunized library from liability for failing to screen sexually explicit photos minor accessed through Internet); *Schneider*, 31 P.3d at 41-42 (Wash. App. 2001) (finding Section 230 protected Amazon.com from liability for failing to remove negative reviews of author's book from Web site); *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC,* 2005 WL 3299077, No. CV03-09386PA, **3-4 (C.D. Cal. Sept. 30, 2005) (finding Section 230 barred claims that Web site violated the Federal Fair Housing Act where third parties posted discriminatory content); *Stoner v. eBay, Inc.*, 2000 WL 1705637, No. 305666, *2 (Cal. Super. Nov. 1, 2000) (finding eBay not liable under Section 230 for sale of allegedly "bootleg" compact discs by users through its Web site).

(1) a deprivation of a right "secured by the Constitution and the laws" of the United States[11]; and (2) deprivation of this right acting "under color of any statute" of the state. *Johnson v. Rodrigues*, 293 F.3d 1196, 1201-02 (10th Cir. 2002). To be under color of law, the deprivation of a federal right "must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible" and "the party charged with the deprivation must be a person who may fairly be said to be a state actor . . . because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Yanaki*, 415 F.3d at 1207-08 (quoting *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982)).

In *Gallagher v. "Neil Young Freedom Concert,"* 49 F.3d 1442 (10th Cir. 1995), the Tenth Circuit issued a comprehensive opinion that discussed in detail the tenets of what constitutes action under "color of law" by private parties.[12] In order to establish state action, a plaintiff must demonstrate that the alleged deprivation of constitutional rights was "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Id*. at 1447.

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[11] As an initial matter, it is not clear that the plaintiff has alleged the deprivation of a right secured by the Constitution and/or the laws of the United States. eBay certainly does not concede that the plaintiff has satisfied this prong. However, because it is so clear that eBay is not a state actor, or acted under the color of state law, the plaintiff's Section 1983 claim is easily dismissed on this prong alone.

[12] In *Gallagher*, the Tenth Circuit listed four tests courts use to determine whether private parties should be deemed state actors when conducting a state action analysis: (1) the public function test; (2) the nexus test; (3) the symbiotic relationship test; and (4) the joint action test. *Id.* at 1447. eBay is not a private actor under any of these tests. First, eBay is not a public actor under the public function test because the state has not delegated to eBay "a function traditionally exclusively reserved to the States." *Id.*; *see also Johnson*, 293 F.3d at 1203 (noting that such traditional situations involve when private parties hold elections, perform necessary municipal functions, or run a nursing facilities). Second, eBay is not a private actor under the nexus test, because the plaintiff has not alleged, nor can it, that there is a sufficiently close nexus between the government and the challenged conduct such that the conduct may be fairly treated as that of the State itself. *Id.* at 1448 (quotations omitted). No nexus existed between eBay and any State; none is alleged, and none will be found. Third, eBay is not a private actor under the symbiotic relationship test, because the state has not "so far insinuated itself into a position of interdependence with [eBay] that it must be recognized as a joint participant in the challenged activity." *Id.* at 1451 (quotations omitted). Here, there is no state action alleged in the Complaint, nor can any ever be alleged. Fourth, eBay is not a state actor under the joint action test because there is no allegation in the Complaint, nor can there ever be, that eBay was "a willful participant in joint action with the State or its agents." *Id.* at 1453 (quotations omitted). The plaintiff alleges no facts demonstrating any degree of cooperative action or overt, significant participation by any state officials. *Id.* Under any of these four tests, eBay cannot be considered a state actor, and accordingly, the plaintiff's Section 1983 claim fails since eBay is not a state actor, nor does it act under the color of state law.

Even accepting all the plaintiff's factual allegations as true, the plaintiff's Complaint fails to allege facts sufficient for finding that eBay is a private actor, where eBay (and the other defendant, acecoins) is not an employee of any State or the federal government. While, private individuals and entities may be deemed state actors if they have "acted together with or [have] obtained significant aid from state officials, or [if their] conduct is otherwise chargeable to the state," *Lugar,* 457 U.S. at 937, the plaintiff's Complaint contains no facts supporting such a finding here. The Complaint does not allege, for example, that eBay acted under a right created by the State, or by a rule of conduct imposed by the State, or that the State was responsible for eBay's conduct. The Complaint is simply devoid of any allegation of state conduct here, or of any facts that would support a finding that eBay acted under the color of state law. As the Complaint details, this is a case about a third party (acecoins) posting allegedly discriminatory statements about the plaintiff on eBay's website. State action is simply not implicated in the plaintiff's Complaint. Accordingly, the plaintiff's Section 1983 claim fails as a matter of law, and should be dismissed without leave to amend.

D. The Plaintiff's 42 U.S.C. § 1985 Claim Should Be Dismissed as to eBay Under Rule 12(b)(6) Because the Plaintiff Does Not Allege That eBay Acted With Racial Animus, Nor Does the Plaintiff Allege that eBay Has Interfered With A Right That is Protected Against Private Encroachment.

42 U.S.C. § 1985 prohibits conspiracies to violate civil rights.[13] Section 1985(3) prohibits two or more persons from conspiring "for the purpose of depriving, either directly or

[13] Section 1985 has three prongs, each prohibiting different types of conspiracies: (1): preventing an officer from performing duties; (2) obstructing justice or intimidating a party, a witness, or a juror; and (3) depriving persons of rights or privileges. 42 U.S.C. § 1985. The first two prongs are clearly not applicable here.

indirectly, any person . . . of the equal protection of the laws, or of equal privileges and immunities under the laws. . ." 42 U.S.C. § 1985(3). To state a claim under Section 1985(3), a plaintiff must show: (1) a conspiracy, motivated by racially discriminatory animus; (2) to deprive plaintiff of equal protection of the constitution or laws; (3) an act in furtherance of the conspiracy; and (4) a deprivation of rights resulting therefrom. *Tilton v. Richardson*, 6 F.3d 683, 686 (10th Cir. 1993).

This claim fails because the plaintiff has not alleged any racial or discriminatory animus on the part of eBay. At best, the plaintiff alleges that eBay "allows to put national discrimination on web site." It supported 2 defendants and provided discrimination policy." Ex. B (Complaint, section C). The plaintiff also baldly alleges that "[f]urther actions of ebay can demonstrate, they do racist policy." Ex. C. But there is no allegation that eBay was motivated by racial animus, nor can one be pleaded.

Further, Section 1985(3) only covers private conspiracies aimed at interfering with rights that are protected against private, as well as official, encroachment. *Tilton*, 6 F.3d at 686. The Supreme Court has recognized only two rights as protected against private conspiracies under Section 1985(3): the right to be free from involuntary servitude and the right to interstate travel, both under the Thirteenth Amendment. *Id.* (citation omitted). There is no allegation in the Complaint, nor can there ever be, that eBay has subjected the plaintiff to involuntary servitude or restricted the plaintiff's right to interstate travel. As such, the plaintiff's Section 1985(3) claim necessarily fails, and eBay respectfully requests that it be dismissed with prejudice. *See id.* (dismissing complaint for failure to state a cause of action under Section 1985(3) where the plaintiff alleged a violation of his First Amendment rights).

CONCLUSION

Plaintiff's Complaint as to eBay should be dismissed pursuant to Rule 12(b)(3) based on the forum selection clause in the User Agreement specifying that the plaintiff must bring suit against eBay in Santa Clara County, California. In the alternative, the Complaint should be dismissed for failure to state a claim because: (1) eBay is immune under Section 230 for statements posted by third parties on its website; and (2) the plaintiff's Section 1983 and Section 1985 claims are fatally defective.

DATED this 6th of June, 2006.

STOEL RIVES LLP

/s/ Cameron L. Sabin
Cameron L. Sabin

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Michael G. Rhodes
Benjamin F. Chapman

Attorneys for Defendant eBay, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June 2006, I mailed a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR IMPROPER VENUE OR, IN THE ALTERNATIVE, FOR FAILURE TO STATE A CLAIM**, postage prepaid, to:

Tetyana Nazaruk
274 W. 200 S. Apt. 43
Salt Lake City, UT 84101

/s/ Sharon L. Astin